No. 93-1943

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Supreme ... U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BRIAN SHEPPARD,

Petitioner,

—against—

LEON BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent Leon Beerman, a Justice of the Supreme Court of the State of New York ("respondent Justice"), respectfully submits this brief in opposition to the petition for a writ of certiorari. The petition should be denied because, as an initial matter, petitioner seeks review of an interlocutory order. Moreover, the petition does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

STATEMENT OF THE CASE

Petitioner commenced this civil rights action pursuant to 42 U.S.C. § 1983 on April 16, 1991, against respondent Justice,

alleging that respondent Justice violated his First and Fourth Amendment rights in discharging him from employment as respondent's law clerk. Petitioner, an attorney licensed to practice law in the State of New York, was hired in October, 1986 by respondent Justice to serve as his law clerk. (68-a, ¶ 22).[1] He was fired on December 10, 1990, after a serious argument with respondent on December 7, 1990. (75-a, ¶ 22).

According to the complaint, on December 6, 1990, respondent Justice directed petitioner to draft a decision denying a criminal defendant's pending speedy trial motion. (71-a, ¶ 11). Petitioner admits that the next morning he adamantly refused to follow respondent's directive that he draft the decision. (*Id.*) A discussion between petitioner and respondent Justice ensued, which quickly escalated into a heated argument. During the course of the argument, petitioner admits that he called respondent Justice "corrupt" and a "son-of-a-bitch," and asserts that respondent referred to him as "disturbed" and "disloyal." (72-a, ¶ 14). The complaint asserts that the argument ended without resolution, and that petitioner worked the remainder of the day. (72-a - 73-a, ¶ 16).

When petitioner returned to work on December 11, 1990, he was advised by court officers that he had been fired effective December 10, 1990. (75-a, ¶ 22). The complaint further alleges that the court officers directed plaintiff to immediately leave the courthouse, that he was not allowed to collect his belongings from his office, and that he was directed not to return for his property except in the company of officers at a later time. (*Id.*) Petitioner alleges that he was then escorted out of the courthouse by two court officers. (*Id.*)

Petitioner also claims that both just before and after he was fired his office was searched by respondent Justice or by others at the respondent's direction. (74-a - 76-a, ¶¶ 19, 24). Further, he claims that a box containing his personal file cards was seized and removed to respondent's office and examined,

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[1] References to the Petition and the Appendix to the Petition are cited as "__" and "__-a," respectively.

and that his remaining belongings were placed in a box and put aside. (76-a, ¶ 24). Petitioner admits, however, that just two days after his discharge, on December 13, 1990, he was permitted to enter respondent Justice's chambers and retrieve his personal belongings, including the file cards. (76-a, ¶ 25). Petitioner alleges that on that day, he attempted to remove personal files from his file cabinet and was prevented from doing so, but concedes that on December 17, 1990, he was told he could have the files and on December 21, 1990 they were returned. (76a - 77-a, ¶¶ 26-28).

In addition, the complaint alleges that respondent interfered with petitioner's courthouse activities. (79-a - 80-a, ¶ 34). He claims that on January 18, 1991, when he attended the calendar call in respondent's courtroom, the Judge directed that if he wished to examine court files he would have to do so outside the courtroom, causing petitioner to miss part of the calendar call. (*Id.*) Additionally, petitioner alleges that on February 11, 1991, he was told by respondent not to keep coming in and out of the courtroom during the calendar call, and that when petitioner attempted to respond the Judge told him to sit down and be quiet. (80-a - 81-a, ¶ 37).

Pursuant to 42 U.S.C. § 1983, petitioner asserts that respondent's actions violated his First Amendment rights to freedom of speech, to petition for redress of grievances and to access to the court, as well as his Fourth Amendment right to be free from unreasonable searches and seizures. (81-a - 82-a, ¶ 38).

Respondent moved for judgment on the pleadings on or about February 6, 1992, on the grounds that petitioner had not met threshold pleading requirements, that the complaint failed to state a cause of action, and that respondent Justice was entitled to qualified immunity.

A. Decision of the District Court

By memorandum and order dated May 21, 1993, the United States District Court for the Eastern District of New York (*Glasser*, J.) granted respondent's motion for judgment on the

pleadings on the ground that petitioner could not state a cognizable constitutional claim under any set of facts as a matter of law. (31-a - 47-a).

The district court held that as a matter of law petitioner's speech did not pertain to a matter of public concern, and thus his discharge did not implicate the First Amendment. (40-a - 47-a). The court held that petitioner's other First Amendment claims must also be dismissed as non-cognizable. (45-a - 47-a).

With respect to petitioner's Fourth Amendment claims, the district court held that as a matter of law petitioner had failed to state a cause of action upon which relief could be granted. (52-a). The one week delay in retrieving his property from the judge's chambers did not amount to an unlawful seizure, (49-a), because it was objectively reasonable for the respondent to safeguard court files by requiring petitioner to return later, in the company of court officers, in order to prevent petitioner from removing or destroying documents in retaliation for being fired. (48-a - 49-a). The court also held that petitioner's person had not been seized when he was escorted out of the respondent Justice's chambers on December 11, 1990, or when he was told to sit down and be quiet after repeatedly entering and exiting respondent's courtroom on February 11, 1991. (52-a, n. 3). In neither instance, the court ruled, was petitioner's liberty restrained. He was free to go anywhere else but the courthouse on December 11, 1990, and was free to remain in or leave the courtroom on February 11, 1991. (*Id.*)

The court also rejected petitioner's claim that his property was unlawfully searched. The court reasoned that, given the unique working relationship between judge and clerk, the myriad documents pertaining to judicial matters in a judge's chambers are per force subject to the control of the judge. (52-a). In light of the nature of the particular work environment, petitioner had no reasonable expectation of privacy in the furnishings or appurtenances of the judge's chambers and other work areas. (*Id.*) Absent such reasonable expectation of

privacy, the court held that the Fourth Amendment was not implicated. (51-a - 52-a).

B. Decision of the Court of Appeals

The court of appeals affirmed the district court's decision in part and vacated and remanded the decision in part. (20-a - 21-a). The court affirmed the District Court's finding that respondent's conduct did not implicate the Fourth Amendment. (15-a - 20-a). Specifically, the court confirmed the district court's conclusion that petitioner "had no reasonable expectation of privacy in his office furniture or file cabinets, and therefore any search was not violative of [petitioner's] Fourth Amendment rights." (16-a). A basis for the court's holding that the district court was correct was the "distinctive open access to documents characteristic of judicial chambers." (17-a).

The court also agreed with the district court's finding "that any alleged seizure done in connection with the search was similarly not violative of [petitioner's] Fourth Amendment rights." (18-a). The court stated that, "[e]ven assuming that [petitioner's] belongings were seized for a short time during the judges' search of his things, a short delay by a judicial employer in returning a disgruntled employee's belongings after the employee has been fired does not rise to the level of a Fourth Amendment violation." (18-a).

The court of appeals also affirmed the district court's dismissal of petitioner's claim of unlawful seizure of his person when he was escorted out of the courthouse by court officers on December 11, 1990, (19-a), holding that petitioner's liberty was never restrained because petitioner was "free to go anywhere else that he desired, with the exception of [respondent's] chambers and the courthouse." (20-a).

As to petitioner's First Amendment claims, the court of appeals held "that in concluding the [petitioner] failed to state a violation of his First Amendment right to free speech, the district court made certain factual determinations that were

not appropriate on a motion for judgment on the pleadings." (20-a - 21-a). Consequently, the court vacated the district court's dismissal of petitioner's First Amendment claims on the pleadings and remanded "for proceedings not inconsistent with this opinion." (21-a). The court made clear that "[i]n doing so. . .we make no comment on the merits of the claim nor do we preclude the district court from re-examining the matter at some future, more appropriate time in the proceedings." (21-a).[2]

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because petitioner seeks review of an interlocutory order, that part of the court of appeals' order affirming the district court's dismissal of all of petitioner's Fourth Amendment claims. In addition, even assuming the Court determines to review the interlocutory judgment, it should deny the writ of certiorari because the petition does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

This Court has long recognized that federal law expresses a policy against piecemeal appeals. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 178 (1955). While this Court clearly has jurisdiction to review interlocutory judgments, such as that presented here, "the interlocutory nature of a federal court of appeals judgment is relevant to the Court's discretionary assessment of the appropriateness of immediately reviewing such a judgment." Stern, Gressman & Shapiro, *Supreme Court Practice*, (6th ed. 1986), at p. 224.

According to this Court in *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893), the Court "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory

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[2] Petitioner has requested that the district court hold the matter in abeyance pending disposition of the instant petition.

order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *** And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accordingly, the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for the denial of the application." *Id. See also, Brotherhood of Locomotive Firemen and Engineermen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (certiorari review denied "because the court of appeals remanded the case [and therefore it] is not yet ripe for review by this Court"); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (referring to "the Court's normal practice of denying interlocutory review" (*Stevens, J., dissenting*)). *See also* Stern, Gressman & Shapiro, *Supreme Court Practice*, at p. 224.

In the instant case, the decision of the court of appeals is clearly interlocutory in nature. As noted above, the court of appeals affirmed so much of the district court's order dismissing the Fourth Amendment claims, but vacated and remanded as to petitioner's First Amendment claims. Petitioner cannot demonstrate that this Court's immediate review of the instant issue presented, namely, the Fourth Amendment claim, is in any way "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction, et al. v. Jacksonville, et al.*, 148 U.S. at 384. Neither can petitioner show that the question presented is at all "of peculiar gravity and general importance." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. at 258.

Indeed, as demonstrated by petitioner's phrasing of his Questions Presented, Nos. 2 and 3, (i), petitioner himself posits the Fourth Amendment issue as being inextricably interwoven with the First Amendment issues which were remanded to the district court. Specifically, petitioner's ref-

erences to "retaliatory discharge" and to his purported "discharge. . .for objecting to the misconduct of the judge" are clearly references to the First Amendment issues remanded to the district court.

Moreover, petitioner will not be prejudiced if the petition is denied. It is well-settled that this Court has the power to reach back to all interlocutory proceedings and address any alleged prior judicial errors in the context of a subsequent certiorari petition from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial. *Mercer v. Theriot*, 377 U.S. 152 (1964); *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Hamilton-Brown Shoe Co.*, 240 U.S. 251, 258 (1916). A prior denial of a petition for a writ of certiorari by the Court on an interlocutory appeal does not constitute *res judicata* on the issue for future appellate review. *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. For these reasons the Court should adhere to its "normal practice of denying interlocutory review," and deny certiorari review here.

In any event, as noted above, the petition does not meet this Court's criteria for certiorari review because it does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court. Indeed, petitioner does not even allege that a conflict exists among the courts of appeals on the Fourth Amendment issue presented.

In rejecting petitioner's Fourth Amendment claims both the district court and the court of appeals simply applied well-established principles. Whether a search implicates the warrant requirement of the Fourth Amendment depends on whether society objectively recognizes a privacy interest in the area to be searched. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). As the Court stated in *O'Connor*: "[p]ublic employees' expectations of privacy in their offices may be reduced by virtue of actual office practices. . .[and] some government offices may be so open to fellow employees or the public that

no expectation of privacy is reasonable. . .Given the great variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id.* at 717-18.

Here, the courts below correctly held that, given the unique working relationship between judge and law clerk, the myriad documents and records pertaining to judicial matters in a judge's chambers are perforce subject to the control of the judge. (51-a - 52-a). In light of the nature of the particular work environment, plaintiff had no reasonable expectation of privacy in the furnishings or appurtenances of the judge's chambers and other work areas. (*Id.*) Absent such reasonable expectation of privacy, the Fourth Amendment was not implicated. (*Id.*)

Similarly, it was objectively reasonable for the respondent Justice to safeguard court files by requiring petitioner to return later in the company of court officers in order to prevent petitioner from removing or destroying documentation in retaliation for being fired (48-a - 49-a), and to have petitioner escorted out of the respondent's chambers on December 11, 1990. In neither instance was petitioner's liberty restrained. Accordingly, there is no conflict or important federal question which merits this court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 29, 1994

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